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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARLOS OMAR GUERRA, Defendant and Appellant.	B296806 (Los Angeles County Super. Ct. No. BA464743)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed as modified.

Jeanine G. Strong, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Paul M. Roadarmel, Jr., Deputy Attorney

General, and Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

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In this appeal, Carlos Omar Guerra (defendant) argues that the trial court (1) violated *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) when it imposed $1,090 in fines and assessments as part of his sentence without holding an ability-to-pay hearing, and (2) miscalculated his custody credits. By not objecting when he could have, defendant has forfeited these arguments. They also lack merit. Accordingly, we affirm defendant's sentence but order the abstract of judgment modified as directed.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In October 2017, defendant went to the gated apartment complex where the mother of two of his children lived. While there, he punctured the tires of her car. When she came out of the complex to confront him, he punched her in the face, tried to choke her, and then broke off one of her acrylic fingernails. When the mother's brother came outside to help her, defendant displayed a gun in his waistband and warned him either "Get your punk ass away or I'll blast you" or "I got something for you." The mother told defendant not to remove the gun from his pants because it was "[her] brother." When the mother's mother came outside and told defendant to stop, he walked off cussing. By the time of this incident, defendant had already suffered convictions for robbery and carjacking in 2001 and convictions for possession of a firearm and possession of ammunition in 2015.

II. Procedural Background

The People charged defendant with (1) inflicting corporal injury on a parent of one's child[ren] (Pen. Code, § 273.5, subd. (a))[1] for harming the mother; (2) making criminal threats (§ 422) to the brother; (3) being a felon in possession of a firearm (§ 29800, subd. (a)(1)); (4) felony vandalism (§ 594, subd. (a)) for puncturing the tires; and (5) assaulting the brother with a firearm (§ 245, subd. (a)(2)). As to the criminal threats and assault with a firearm counts, the People alleged that defendant "personally used a firearm" (§ 12022.5, subd. (a)). The People additionally alleged that defendant's 2001 convictions for carjacking and for robbery constitute two separate strikes under our Three Strikes Law (§§ 667, subd. (b)-(j), 1170.12, subds. (a)-(d)), prior serious felonies (§ 667, subd. (a)), and prior prison terms (§ 667.5, subd. (b)).

A jury convicted defendant on all counts and found the firearm enhancements true. Defendant subsequently admitted his prior convictions.

The trial court sentenced defendant to prison for 10 years and eight months. The court imposed a sentence of eight years on the assault with a firearm count, comprised of a base sentence of four years for the assault (two years, doubled for a single, prior strike) plus four years for the firearm enhancement. The court imposed a consecutive sentence of 16 months for each of the criminal threats and felon in possession counts, comprised of one-third of the middle term of two years, doubled for a single, prior strike. The court imposed concurrent sentences on the remaining counts. In imposing this overall sentence, the court dismissed

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

one of the "strike" allegations, both prior serious felony allegations and both prior prison term allegations. The court imposed a single $300 restitution fine (§ 1202.4), $150 in court facilities assessments (Gov. Code, § 70373) ($30 per count), and $200 in court operations assessments (§ 1465.8) ($40 per count). The court also awarded defendant 557 days of custody credit, calculated as 485 actual days of custody and 72 days of conduct credits.

At the same sentencing hearing, the court found the convictions in this case violated defendant's probation in the 2015 case. The court imposed a total sentence of three years and four months on the two counts in that case, and ordered them to run consecutively to the sentence imposed in this case. The court also imposed a $300 restitution fine, $60 in court facilities assessments ($30 per count), and $80 in court operations assessments ($40 per count).

Defendant filed a timely notice of appeal.

DISCUSSION

I. *Dueñas*

Citing the constitutional guarantees of due process and excessive fines, *Dueñas* held that trial courts may not impose three of the standard criminal fines and assessments—namely, the $300 minimum restitution fine, the $30 criminal convictions assessment, and the $40 court operations assessment—without first ascertaining a defendant's ability to pay them. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1164, 1172, fn. 10.) So, defendant argues, *Dueñas* applies to the $650 in fines and assessments imposed in the underlying case and the $440 in fines and assessments imposed in the probation violation case, and bars

their imposition because the trial court did not first ascertain his ability to pay them.[2] We reject this argument for several reasons.

First and foremost, defendant has forfeited any objection to the imposition of these fines and assessments. Unlike others, defendant had the ability to make a *Dueñas* objection because he was sentenced six weeks *after Dueñas*. But he did not do so. This constitutes a forfeiture. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1248-1249 [party's failure to object based on a five-week-old case constitutes a forfeiture].) To avoid this forfeiture bar, defendant asserts that his attorney was constitutionally ineffective for not objecting. We need not confront this claim because, as explained next, any *Dueñas* objection was without merit, rendering the failure to object both objectively reasonable *and* without any prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.)

Second, defendant's *Dueñas* argument lacks merit. As a threshold matter, we have concluded that *Dueñas* was "wrongly decided." (*People v. Hicks* (2019) 40 Cal.App.5th 320, 322, review granted Nov. 26, 2019, S258946.) Further, even if we assumed *Dueñas*'s validity, the record in this case indicates that defendant has the ability to pay the $1,090 in assessments during the 14 years he will be in prison. (Cf. *People v. Bennett* (1981) 128 Cal.App.3d 354, 359-360 [remand for resentencing unnecessary where "the result is a foregone conclusion"].) A defendant's ability to pay includes "the defendant's ability to obtain prison wages and to earn money after his release from custody." (*People*

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[2] Defendant adds another $600 to this total by including the amount of the parole revocation fines imposed in each case, but ignores that those fines were suspended. *Dueñas* has not been applied to suspended fines.

v. Hennessey (1995) 37 Cal.App.4th 1830, 1837; *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377.) Prisoners earn wages of at least $12 per month. (Dept. of Corrections, Operations Manual, §§ 51120.6, 51121.10 (Jan. 1, 2020).) At even this minimum rate, defendant will have enough to pay the $1,090 in assessments and fines in 91 months (that is, in just over eight and a half years) which is long before his 14-year sentence would end. Even if defendant does not voluntarily use his wages to pay the amounts due, the state may garnish between 20 and 50 percent of those wages to pay the restitution fine. (§ 2085.5, subds. (a) & (c); *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1093.) The record also contains evidence that defendant, at the time of his crime, was employed. Because defendant "points to no evidence in the record supporting his inability to pay" (*People v. Gamache* (2010) 48 Cal.4th 347, 409), and hence no evidence that he would suffer any consequence for non-payment, a remand on this issue would serve no purpose.

Lastly, and to the extent defendant argues that the $1,090 in monetary obligations constitutes cruel and unusual punishment, we reject that argument as well. Whether such an obligation is excessive for these purposes turns on whether it is "grossly disproportional to the gravity of [the] defendant's offense." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334 (*Bajakajian*), superseded by statute on other grounds as stated in *United States v. Jose* (2007) 499 F.3d 105, 110.) Factors relevant to gross disproportionality include "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay. [Citations.]" (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.) Under

this standard, a defendant's ability to pay is *a* factor, not *the only* factor. (*Bajakajian*, at pp. 337-338.) Applying these factors, we conclude that the minimum monetary obligations totaling $1,090 are not grossly disproportionate to his crimes of assaulting someone with a firearm, making criminal threats, and being a felon in possession—all committed while he was still on probation for robbery and carjacking.

II. Custody Credits

Defendant was arrested for the conduct in this case on October 30, 2017, and was sentenced on March 6, 2019. Because a defendant is entitled to actual custody credit for "all days" he spends in presentence custody, including the day of arrest and the day of sentencing (§ 2900.5, subd. (a); *People v. Bravo* (1990) 219 Cal.App.3d 729, 735), defendant argues that he is entitled to 493 days of actual credit—which is more than the 485 days the trial court awarded. On this record, however, defendant's argument does not add up. His own lawyer told the trial court that defendant was entitled to 485 days of actual custody credit because, for some period of time after October 30, 2017, defendant was "out [of custody] on his own recognizance." Defense counsel made the same representation about some period of interim release at defendant's preliminary hearing. Although, as defendant correctly notes, the record here is ambiguous as to how defense counsel—and hence the trial court—came up with 485 days of actual credit, it is defendant's burden to show that the trial court *erred*. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 364.) "Ambiguity" or uncertainty "in the record" does not satisfy that burden. (*People v. Garcia* (1987) 195 Cal.App.3d 191, 198.)

III. Error in the Abstract of Judgment

The Abstract of Judgment dated March 13, 2019, states that the court imposed a two-year enhancement on count 5 under section 12022.1. This is incorrect, as the enhancement was imposed under section 12022.5. We can and do order that the abstract be corrected. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The abstract of judgment dated March 13, 2019, is ordered amended to reflect that defendant received a sentence enhancement for count five under section 12022.5, not section 12022.1. Accordingly, the trial court is ordered to prepare and forward to the California Department of Corrections and Rehabilitation a modified abstract of judgment.

As modified, the judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ